Supreme Court, U.S.
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No. 10-1073

In The

Supreme Court of the United States

PATRICIA D. CYDRUS,

Petitioner,

v.

OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM and OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD OF TRUSTEES,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the administrative review statute, Ohio Adm. Code 145-2-23, afford procedural due process to members of the Ohio Public Employees Retirement System (OPERS) when it allows OPERS to terminate disability retirement benefits without providing the opportunity of a hearing and, furthermore, allows OPERS to issue a termination notice announcing the decision but providing no explanation?

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Petitioner, Patricia D. Cydrus, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The decision of the Supreme Court of Ohio, affirming the decision of the Court of Appeals of Ohio, Tenth Appellate District, is reproduced at Appendix 1-17. The decision of the Court of Appeals of Ohio, Tenth Appellate District (including the Magistrate's Decision), is reproduced at Appendix 18-56.

JURISDICTION

The Decision of the Court of Appeals of Ohio, Tenth Appellate District, was entered March 23, 2010. Petitioner, Patricia D. Cydrus, appealed to the Supreme Court of Ohio April 23, 2010. The Supreme Court of Ohio issued its decision December 2, 2010. The time within which Petitioner may file her Petition for Writ of Certiorari expires March 2, 2011.

This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

Section 1, Fourteenth Amendment to the Constitution of the United States, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Adm. Code 145-2-23 provides:

> (A) This rule applies when the public employees retirement board either denies an application for a disability benefit filed pursuant to section 145.35 of the Revised Code or terminates a disability benefit pursuant to section 145.362 of the Revised Code.
>
> (B) (1) After the retirement board has either denied an application for, or terminated, a disability benefit, the member shall be notified in writing of such action.
>
> (2) The notice shall be sent by regular mail.
>
> (3) The notice shall include the following information:

(a) The retirement board's denial or termination of the disability benefit.

(b) The member's right to file a written notice of intent to provide additional objective medical evidence. Such notice of intent must be received by the retirement board no later than thirty days from the date of the notice of denial or termination.

(c) Failure of a member to submit a notice of intent to provide additional medical evidence shall make the retirement board's action final as to such application or benefit.

(d) Such additional evidence shall be current medical evidence documented by a licensed physician specially trained in the field of medicine covering the illness or injury for which the disability is claimed and such evidence has not been considered previously by the retirement board. Such additional medical evidence shall be presented in writing by the member and shall constitute an appeal of the denial or termination.

(e) Failure to provide the additional medical evidence within forty-five days of the member's notice of intent to provide such evidence shall make the retirement board's action final to such application or benefit unless an extension for submission of such evidence has been requested and granted within the forty-five days. Only one extension, not to exceed forty-five days, may be granted by the retirement board's staff.

(f) All medical costs of physicians selected by the member and incident to the appeal shall be at the expense of the member.

(C) (1) After submission of any additional medical evidence as described in paragraph (B)(3)(d) of this rule, all evidence shall be reviewed by the retirement board's medical consultant(s) who shall recommend action for concurrence by the board.

(2) If the board concurs with a recommendation for approval of the appeal, disability benefits shall be paid from the date that was established when the original application for a disability benefit was filed. If a recommendation for termination of a disability benefit was appealed and

the appeal is approved by the board, the payments shall be resumed from the date of termination. The member shall be notified by regular mail of the board's decision.

(3) If the board concurs with a recommendation for denial of the appeal, the member shall be notified by regular mail of the board's decision and such decision shall be final.

(4) Any subsequent applications for a disability benefit filed after a denial of an appeal shall be submitted with medical evidence supporting progression of the disabling condition or evidence of a new disabling condition. If two years have elapsed since the date the member's contributing service terminated, no subsequent application shall be accepted.

STATEMENT OF THE CASE

Petitioner, Patricia D. Cydrus (Petitioner), was employed as an Executive Secretary with the Ohio Department of Youth Services. Petitioner developed a debilitating physical condition while employed and, therefore, applied for a disability retirement with Respondent, Ohio Public Employees System (Respondent), on November 12, 2002. Respondent approved the disability retirement on June 18, 2003. Respondent required Petitioner to undergo annual medical

examinations following her disability retirement, even though her attending physician continued to certify that the condition was permanent and, in fact, worsening. After scheduling Petitioner for exams on July 30, 2008 and September 7, 2008, Respondent sent a letter on November 13, 2008 notifying Petitioner that her retirement benefits were being terminated.

Petitioner filed an appeal and submitted new medical evidence relating to the ongoing nature of her medical disability. Respondent sent another letter to Petitioner on January 20, 2009, notifying her that the termination decision was final:

> * * * Based upon all the medical information and recommendations, the Ohio PERS medical advisors and the board concluded that you are not considered to be permanently disabled from the performance of duty as a [sic] Executive Secretary. Specifically, there is insufficient objective evidence of permanent disability due to No [sic] additional new information. On the basis of this information, the board upheld its previous action to discontinue your disability benefits. **This decision regarding your appeal is final.** * * * (Emphasis in original) (Appendix 57).

Petitioner filed an original action with the Court of Appeals of Ohio, Tenth Appellate District, seeking a writ of mandamus directing Respondent to vacate its termination decision and to reinstate her disability retirement benefits. Alternatively, Petitioner requested a limited writ of mandamus directing

Respondent to consider her new evidence and to issue a new decision.

A duly-appointed Magistrate of the Ohio Court of Appeals issued a decision on November 25, 2009, denying a writ of mandamus, having concluded that Respondent did not abuse its discretion in terminating disability benefits. Petitioner filed written objections on December 9, 2009, raising a constitutional argument that the administrative appeals process contained within Ohio Adm. Code 145-2-23 violated due process by taking a property right without affording the opportunity of a hearing or providing an explanation for the termination sufficient for a reviewing court to determine whether an "abuse of discretion" had occurred.

On March 23, 2010, the Ohio Court of Appeals issued a decision, upholding the decision of the Magistrate. Petitioner timely appealed to the Supreme Court of Ohio on April 23, 2010 and argued that Ohio Adm. Code 145-2-23 was unconstitutional because it (1) allowed Respondent to terminate disability retirement benefits without providing the opportunity of a hearing; (2) allowed Respondent to terminate disability retirement benefits without providing a narrative explanation; and (3) vitiated the independent authority of the courts, the final arbiter of contested administrative decisions, to perform a meaningful review of Respondent's decision when Respondent has provided no explanation for its decision.

On December 2, 2010, the Supreme Court of Ohio concluded Petitioner had received the requisite due process because (1) she had the opportunity to appeal Respondent's November 13, 2008 termination; (2) she was given the opportunity to submit new medical evidence with the appeal; (3) she was able to challenge Respondent's final decision of January 20, 2009 by filing a mandamus lawsuit; and (4) she was able to see the reports of Respondent's examining physicians who had opined she was now capable of working. The Supreme Court of Ohio also concluded the independent authority of the judiciary was not abrogated by Ohio Adm. Code 145-2-23 because a narrative explanation for Respondent's decisions is not necessary to perform a meaningful review.

REASONS FOR GRANTING THE PETITION

The Administrative Review Procedure Set Forth By Ohio Adm. Code 145-2-23(B) and (C) Allowing the Ohio Public Employees Retirement System To Deny Or Terminate Disability Retirement Benefits Violates The Constitutional Due Process Protection Of Affording An Opportunity To Be Heard When Property Is Taken.

The administrative review procedure contained within Ohio Adm. Code 145-2-23 violates the due process mandate of the Fourteenth Amendment by allowing Respondent to take a member's property

without a hearing and by not allowing the member to know the reasons for the termination of benefits.

This case involves an issue of great public interest in the State of Ohio because of the high number of public employees who are affected by the statute in question. The Ohio Public Employees Retirement System (OPERS) pension fund has assets of $75.7 billion and is "the largest state pension fund in Ohio, and the 12th largest public retirement system and the 16th largest retirement system in the U.S."[1] According to Respondent, "[m]ore than 3,700 public employers in Ohio are part of the OPERS system" and Respondent "serves nearly 954,000 members."[2]

Ohio Adm. Code 145-2-23 became effective following the repeal of former Ohio Adm. Code 145-11-02 on January 1, 2003. 2002-2003 Ohio Monthly Record 1304. The former statute did not require a hearing, but did require that Respondent provide "reasons" for its decisions. See *State ex rel. Green v. Pub. Employees Retirement Sys.* (June 22, 1999), Franklin App.No. 98AP-567.

In order to qualify for a disability retirement, a member of OPERS, except a law enforcement or public safety officer, must have at least five (5) years

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[1] As of December 31, 2010. See, Ohio Public Employees Retirement System, https://www.opers.org/about/history/.

[2] See, Ohio Public Employees Retirement System, https://www.opers.org/about/history/.

of total service credit into the fund. Ohio Rev. Code §145.35(B). A member's contributions into the OPERS fund are based upon the member's public employment earnings and are compulsory. Ohio Rev. Code §145.03(A). A member makes compulsory monetary contributions into OPERS at the rate of eight percent (8%) to ten percent (10%) of the member's earnable salary. Ohio Rev. Code §145.47(A).

A member of OPERS has a significant property interest in these contributions over the course of his/her employment. Ohio Rev. Code §145.95 defines the property interest as follows:

> . . . [T]he right of a member participating in a PERS defined contribution plan to any payment or benefit accruing from contributions made by or on behalf of the member . . . shall vest in accordance with this section. . . . A member's right to any payment or benefit that is based on the member's contributions is nonforfeitable. . . . A member's right to any payment or benefit that is based on contributions by the member's employer is nonforfeitable as specified by the plan selected by the member.

According to *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 779-80 (1980), "property" in the constitutional sense is a label applied to a benefit when an individual has a "legitimate entitlement" to it under "existing rules or understandings." See, also, *Klein v. Califano*, 586 F.2d 250, 258 (3d Cir. 1978).

These "rules" and "understandings" arise from sources independent of the Constitution and are typically found in state statutes and the common law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Constitution recognizes a benefit as "property" entitled to due process protection when those sources provide an individual with a presently enforceable right to control the benefit. *Id.* The term "legitimate entitlement" encompasses those benefits "that the state has accorded in the past, and that the individual has a reasonable expectation will continue in the future." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999). Once a retirement is approved, a retiree has a property interest in continued pension payments. *Leheny v. City of Pittsburgh*, 183 F.3d 220, 227 (3d Cir. 1999); *Pappas v. City of Lebanon*, 331 F.Supp.2d 311, 317 (M.D. PA 2004). Petitioner, therefore, had a property interest in continued receipt of disability retirement benefits previously provided by Respondent.

Petitioner maintained the appeals process employed by the State of Ohio to terminate benefits unconstitutionally deprived her of property without due process of law. The Supreme Court of Ohio rejected Petitioner's argument and relied upon *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio St.3d 261, 2008-Ohio-5377, 898 N.E.2d 33, to conclude Ohio Adm. Code 145-2-23 complies with procedural due process. *VanCleave* is distinguishable because it involved a retirement system with procedural due process safeguards correctly in place. *VanCleave*

involved the Ohio School Employees Retirement System (SERS). Ohio Adm. Code 3309-1-41(A)(2)(a)-(d) sets forth the disability appeals process for SERS and notably provides the member with the opportunity of an in-person hearing before the SERS board. Moreover, the member has the opportunity to attend the hearing with the presence of legal counsel and the member's attending physician as a witness. Ohio Adm. Code 3309-1-41(A)(2)(c). To the contrary, Ohio Adm. Code 145-2-23 allows neither of these opportunities when the property is being taken.

The Ohio Supreme Court proceeded to acknowledge the difference between the statutes in *VanCleave* and the instant case, but concluded " * * * these are insignificant distinctions." *State ex rel. Cydrus v. Ohio Pub. Emps. Retirement Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770, at ¶26. To the contrary, Petitioner submits the provision of a hearing with the opportunity to present facts and argument is a critical distinction evincing the constitutionality of the SERS statute and the unconstitutionality of the OPERS statute, Ohio Adm. Code 145-2-23.

The review procedure contained within Ohio Adm. Code 145-2-23 should comport with the standard enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). According to *Mathews*, three factors must be weighed in defining what process is due:

(1) The importance of the individual interest affected by the official action;

(2) The risk of an erroneous deprivation of this interest through the procedures

used and the probable value of additional or alternative procedural safeguards; and

(3) The government's interest in fiscal and administrative efficiency, and the burden additional or alternative procedures would entail.

Mathews, supra, 424 U.S. at 321. *Mathews* involved the termination of disability retirement benefits previously approved to an applicant under the Social Security Act. The administrative review process entailed an initial procedure administered by the state agency where notice of the termination was provided to the worker, followed by an opportunity of the worker to review the agency's evidence. The state agency then made a final decision. An extra layer of the administrative review process provided that the state agency's final decision was reviewable by the Social Security Administration (SSA). If the worker did not agree with SSA's decision, the worker was afforded the opportunity to request reconsideration. If the decision remained adverse to the worker, the worker could appeal further and obtain an evidentiary hearing before an SSA administrative law judge. Furthermore, the worker could file an additional appeal to the Appeals Council and, finally, obtain judicial review before a U.S. District Court. *Mathews* at 319.

While the worker in *Mathews* was not afforded a hearing at the initial state agency review level, an evidentiary hearing was afforded before the SSA.

This post-termination hearing satisfied procedural due process safeguards. In the instant case, Cydrus was afforded neither a pre-termination or post-termination hearing when her disability benefits were terminated.

The first consideration set forth in *Mathews* demonstrates Petitioner has a significant interest in the continuation of disability retirement benefits. Petitioner had over twenty years of service under the Ohio Public Employees Retirement System. Respondent issued an approval letter for disability retirement on June 18, 2003 and those benefits continued until November 13, 2008. The private interest affected by Ohio Adm. Code 145-2-23 is the deprivation of benefits resulting from compulsory payroll contributions the member has made during the preceding period of at least five (5) years of government employment. These benefits include the potential of continuing disability retirement. Ohio Rev. Code 145.35(B).

The second consideration establishes that the risk of an erroneous deprivation is grave, since, according to Ohio Adm. Code 145-2-23(C)(3), Respondent has the power to simply announce its decision and bears no duty to provide any reasons for its decision. The ability of the state courts to perform a meaningful review, moreover, is significantly compromised because the standard of review changes in an original action in mandamus. An Ohio state court cannot issue a writ of mandamus unless the relator proves the administrative agency has abused its

discretion. *Kinsey v. Bd. of Trustees of Police and Firemen's Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, 225, 551 N.E.2d 989. To prove an "abuse of discretion," Petitioner must demonstrate that Respondent's decision was "unreasonable, arbitrary, or unconscionable." The lack of an explanation in an OPERS mandamus action requires the Ohio courts to speculate as to the reasons why Respondent reached a particular decision, especially when there is conflicting medical evidence.

Regarding the third consideration, the Supreme Court of Ohio did not state, and Respondent has not offered, any data to suggest Respondent would suffer an administrative or fiscal burden if it were required to provide a hearing and/or explain why it accepts or rejects conflicting medical information. Petitioner respectfully maintains that the risk a member would be wrongly denied disability retirement benefits is far outweighed by the administrative or fiscal burden Respondent would experience if it were required to allow a hearing and/or provide an explanation for why it is denying or terminating benefits.

Providing adequate due process to members of Respondent is essential in light of the monetary contributions they have made. The Ohio Public Employees Retirement System is funded by the members' own contributions of eight percent (8%) to ten percent (10%) of their earnable salary. Ohio Rev. Code 145.47(A). Respondent should afford an adequate safeguard to ensure the members' funds are properly managed and benefits are paid under proper

circumstances. Providing a hearing and explanation for their decisions ensures Respondent is properly managing the OPERS fund and appropriately paying retirement benefits, as well as allows the courts to perform a meaningful review when a question is raised as to whether Respondent improperly denied benefits.

The Supreme Court of Ohio concluded the Petitioner's opportunity to challenge Respondent's decision in a mandamus action afforded sufficient due process. See Decision, ¶26. However, as mentioned previously, Ohio law provides that mandamus is an extraordinary remedy and will be issued only when the relator establishes the administrative agency abused its discretion. See, *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254. The relator must show "that the retirement board's decision was unreasonable, arbitrary, or unconscionable." *Id.* at ¶25. Thus, in order to succeed in obtaining a reinstatement of disability retirement benefits, Petitioner bears the burden of meeting a higher standard in court than had she been afforded the opportunity to present her evidence and arguments before Respondent at the administrative level. In addition, Petitioner's efforts to prove Respondent abused its discretion are further impaired by the fact she must overcome a presumption that Respondent acted properly. *State ex rel. Toledo Blade Co., v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶29; *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St.

581, 590, 50 O.O. 465, 113 N.E.2d 14 ("in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner."). Therefore, while Petitioner did have the right to file a mandamus action before the Ohio courts, she was required to prove an abuse of discretion of an administrative agency's decision which contained no reasoning, and which had a presumption of lawfulness. The availability of a mandamus action does not render Ohio Adm. Code 145-2-23 constitutional.

Ohio Adm. Code 145-2-23 provides an administrative review process which denies procedural due process to a member of the Ohio Public Employees Retirement System by failing to allow a hearing and an opportunity to be given reasons for the denial or termination of disability retirement benefits. Petitioner respectfully submits Ohio Adm. Code 145-2-23 violates the Fourteenth Amendment Due Process Clause and urges this Honorable Court to issue a writ of certiorari to the Supreme Court of Ohio.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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THE STATE EX REL. CYDRUS, APPELLANT, *v.*
OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM
ET AL., APPELLEES.

[Cite as *State ex rel. Cydrus v. Ohio Pub. Emps. Retirement Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770.]

Public employees – Disability retirement – Termination of benefits – Writ of mandamus to restore benefits denied – Retirement board has no duty to explain reasons for termination – Lack of such duty does not violate separation of powers or due process – Board's decision to terminate benefits was not abuse of discretion.

(No. 2010-0707 – Submitted October 12, 2010 – Decided December 2, 2010.)

APPEAL from the Court of Appeals for Franklin County, No. 09AP-595, 2010-Ohio-1143.

Per Curiam.

{¶ 1} This is an appeal from a judgment denying a writ of mandamus to compel appellees, Ohio Public Employees Retirement System and Ohio Public Employees Retirement Board, to vacate their order terminating the disability-retirement benefits of appellant, Patricia D. Cydrus, and to issue a new order finding her entitled to benefits, or in the alternative, to compel appellees to issue a new order adequately explaining the reasons for the termination of benefits. Because the retirement board did not abuse its discretion in terminating Cydrus's

disability-retirement benefits, we affirm the judgment denying the writ.

Facts

{¶ 2} Patricia D. Cydrus was employed as an executive secretary by the Ohio Department of Youth Services. While employed with the department, Cydrus was a contributing member of appellee Ohio Public Employees Retirement System. In 1999, Cydrus was involved in an automobile accident and later experienced chronic headaches.

{¶ 3} A December 2000 MRI of Cydrus's brain revealed a "Chiari I Malformation." "Arnold Chiari Malformation Type I" is a "congenital abnormality * * * characterized by the underdevelopment of the bone at the base of the skull (posterior cranial fossa) and overcrowding of the normally developed hindbrain." *Lawson v. United States* (D.Md.2006), 454 F.Supp.2d 373, 378, citing Grossman & Yousem, Neuroradiology: The Requisites (2003) 436. According to Cydrus's treating physician at that time, Lawrence P. Frick, M.D., this condition "allows a portion of the brain to herniate through the skull base which then applies pressure on that part of the brain as well as obstructs the normal flow of cerebrospinal fluid." In January 2002, Cydrus underwent surgery to correct the problem, but she continued to experience severe headaches.

{¶ 4} Almost a year later, Cydrus applied for disability-retirement benefits from the public

employees retirement system. She stated that she was incapacitated from her duties as an executive secretary because of severe muscle spasms, headaches, and continuous symptoms, which required medications that did not help her and which resulted in daily pain, poor balance, and sensitivity to light. Cydrus supported her application with Dr. Frick's report, which stated that "her condition is permanently disabling in that she has not responded to all therapy so far and it has been almost one year since her surgery."

{¶ 5} The retirement board initially denied Cydrus's application based in part on an independent medical examination. On appeal and following a second examination, the board approved the application conditioned upon her reexamination in a year. In following years, after annual independent medical examinations and a record review, the retirement board approved the continuation of disability-retirement benefits conditioned upon Cydrus's annual reexamination.

{¶ 6} In 2008, the retirement board ordered Cydrus to be examined by a psychiatrist and a neurologist to determine whether she remained permanently disabled. The psychiatrist, Richard H. Clary, M.D., examined her and concluded that "her depression alone is not work prohibitive and does not cause long term disability." The neurologist, Gerald S. Steiman, M.D., examined her and observed that she had "tenderness throughout the paraspinal, lateral neck and trapezius muscles but no evidence of muscle

guarding" and "no evidence of a painful tender or trigger point in the occipital, low cervical, trapezius, or supraspinatus regions." Based on his examination and review of her medical records and history, Dr. Steiman concluded that Cydrus is not permanently disabled from the performance of her position as a public employee.

{¶ 7} James R. Moore, M.D., reviewed the results of the examinations and recommended that the retirement board terminate Cydrus's disability-retirement benefits based on "insufficient objective evidence of permanent disability due to chronic daily headache." On November 13, 2008, the retirement board accepted the medical advisor's recommendation and terminated Cydrus's disability-retirement benefits. It concluded that "[b]ased upon all the medical information and recommendations," Cydrus was "no longer considered to be permanently disabled from the performance of duty as Executive Secretary," because "there is insufficient objective evidence of permanent disability due to chronic daily headache." The retirement board notified Cydrus by letter that she could appeal the board's determination by filing a written notice of intent to provide additional objective medical evidence within 30 days and submitting that evidence within 45 days from her written notice. See also Ohio Adm.Code 1452-23(B)(3) and (C).

{¶ 8} Cydrus gave written notice of her intent to appeal the retirement board's decision terminating her disability-retirement benefits on December 3, 2008. Within 45 days, her primary-care physician,

Jennifer E. Sylvester, M.D., submitted her report concluding that Cydrus "is considered totally disabled due to her headaches and the associated symptoms related to her treatment measures for these headaches." Dr. Sylvester noted that "[i]t has been shown on imaging studies that she still has a protrusion of the cerebellar tonsil that was initially documented at 9.7-mm, now has progressed to 14-mm through the foramen magnum. She was seen by a new neurosurgeon, Dr. Bonasso, who at this time, feels that she is stable, but could progress in the future." The imaging report cited by Dr. Sylvester is included in the board's files, but does not bear a time-stamp showing when the board received it and instead includes a facsimile notation that it was received by the board on March 9, 2009, after the deadline for submitting additional evidence had passed.

{¶ 9} On January 20, 2009, Maurice C. Mast, M.D., a medical advisor for the board, recommended that the retirement board terminate Cydrus's disability-retirement benefits. Dr. Mast noted in his recommendation that he had "reviewed the results of the recent examination(s) performed on" Cydrus, and that "[b]ased on the findings presented there is insufficient objective evidence of permanent disability due to [n]o additional new information." On that same day, the retirement board upheld its previous decision to discontinue Cydrus's disability-retirement benefits. The board found that there was insufficient objective evidence of permanent disability and that

Cydrus had provided no new information. The board stated that its decision was final.

{¶ 10} In June 2009, Cydrus filed a complaint in the Court of Appeals for Franklin County for a writ of mandamus to compel the retirement board and the retirement system to vacate the order terminating her disability-retirement benefits and to issue a new order finding her entitled to these benefits. In the alternative, Cydrus requested a writ of mandamus directing that the retirement board and the retirement system issue a new order adequately explaining its reasons for the decision. After appellees filed an answer and the parties submitted a copy of the administrative record and their briefs, the court of appeals magistrate issued a decision recommending that the court deny the writ of mandamus. Cydrus submitted objections to the magistrate's decision. On March 23, 2010, the court of appeals overruled her objections, adopted the magistrate's decision, and denied the writ. *State ex rel. Cydrus v. Ohio Pub. Emps. Retirement Sys.*, Franklin App. No. 09AP-595, 2010-Ohio-1143, 2010 WL 1060624.

{¶ 11} This cause is now before us on Cydrus's appeal as of right.

Legal Analysis

A. *Mandamus – General Standard*

{¶ 12} Cydrus requests extraordinary relief in mandamus, challenging the retirement board decision

terminating her disability-retirement benefits. "[M]andamus is an appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body." *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶ 14. The determination of whether a retirement-system member is entitled to the continued receipt of disability-retirement benefits is within the exclusive authority of the retirement board, R.C. 145.362, and the board's denial of an appeal from the termination of these benefits is final and not subject to appeal. See Ohio Adm.Code 145-2-23(C)(3).

{¶ 13} Because there is no right to appeal the retirement board's decision terminating disability-retirement benefits, mandamus is an appropriate remedy. *State ex rel. Pontillo v. Pub. Emps. Retirement Sys. Bd.*, 98 Ohio St.3d 500, 2003-Ohio-2120, 787 N.E.2d 643, ¶ 23; *State ex rel. Morgan v. State Teachers Retirement Bd.*, 121 Ohio St.3d 324, 2009-Ohio-591, 904 N.E.2d 506, ¶ 20.

B. *Explanations of Terminations*

{¶ 14} Cydrus first addresses her request for a writ of mandamus to compel the retirement board to issue a new decision explaining why it had terminated her disability-retirement benefits.

{¶ 15} "It is axiomatic that in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the

legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus." (Emphasis deleted.) *Pipoly*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶ 18. There is no statute imposing a duty on the retirement board to explain its decision terminating disability-retirement benefits.

{¶ 16} In addition, although former Ohio Adm.Code 145-11-02 specified that the retirement board must state "its basis of denial" of disability-retirement benefits, that administrative rule was repealed on January 1, 2003, and the new version of the rule has no such requirement. Ohio Adm.Code 145-2-23. See *Hamby v. Ohio Pub. Emps. Retirement Sys.*, Franklin App. No. 08AP-298, 2008-Ohio-5068, 2008 WL 4416677, ¶ 17; 2002-2003 Ohio Monthly Record 1304.

{¶ 17} Therefore, the retirement board had no duty under statute or administrative rule to specify the evidence it relied upon or to explain its reasons for terminating Cydrus's disability-retirement benefits. See, e.g., *State ex rel. Marchiano v. School Emps. Retirement Sys.*, 121 Ohio St.3d 139, 2009-Ohio-307, 902 N.E.2d 953, ¶ 23.

{¶ 18} Nevertheless, Cydrus argues that the retirement board's duty to specify the evidence it relied upon and to explain its reasons for its decision arises from constitutional considerations of separation of powers and due process.

{¶ 19} The retirement system and retirement board's claim that Cydrus failed to raise her separation-of-powers argument in the court of appeals is incorrect. She raised her separation-of-powers argument in her objections to the magistrate's decision.

{¶ 20} Appellees next argue that because both constitutional claims were not raised in any complaint or amended complaint and they did not consent to their consideration, Cydrus waived both claims. Although we "need not address" the merits of a constitutional claim on appeal when it is not appropriate, we have not held that a court is *precluded* from considering the merits of such claims if the opposing parties have had the opportunity to fully respond. See *State ex rel. Van Dyke v. Pub. Emps. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, 793 N.E.2d 438, ¶ 42.

{¶ 21} In contrast, the court of appeals in this case exercised its discretion by addressing the merits of some of Cydrus's constitutional claims, and the retirement system and retirement board have briefed them. Therefore, we likewise address the merits.

1. Separation of Powers

{¶ 22} Cydrus first claims that insofar as Ohio Adm.Code 145-2-23(C)(3) permits the retirement board to terminate disability-retirement benefits without specifying its reasons, it violates the separation-of-powers doctrine by abrogating the plenary power of

the judiciary to provide a meaningful review of the board's decisions. "While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159, 28 OBR 250, 503 N.E.2d 136. "The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, 20 O.O.3d 361, 423 N.E.2d 80, paragraph one of the syllabus.

{¶ 23} But administration of justice is not impeded by the lack of a statute or rule requiring the board to explain the reasons for its denial or termination of disability-retirement benefits. Reviewing an administrative record in a mandamus proceeding in such a case is "not any more burdensome than reviewing a summary judgment entered by a trial court without a detailed opinion. See Civ.R. 52." *Pipoly*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶ 21.

{¶ 24} "Although it may be preferable from a policy standpoint that a retirement board explain its reasoning for its decision, the General Assembly is the final arbiter of public policy." *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio

St.3d 261, 2008-Ohio-5377, 898 N.E.2d 33, ¶ 27. As we recently observed in rejecting a separation-of-powers claim, "[i]t is not the role of the courts 'to establish legislative policies or to second-guess the General Assembly's policy choices.'" *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 35, quoting *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212.

2. Due process

{¶ 25} Cydrus also claims that due process requires a more detailed retirement board decision. This court has already rejected a similar claim that the School Employees Retirement System had a duty based on procedural due process to identify the evidence it relied upon and to briefly explain its reasons for denying disability-retirement benefits. *VanCleave*, 120 Ohio St.3d 261, 2008-Ohio-5377, 898 N.E.2d 33, ¶ 23. We held that "[e]ven if it were assumed that [the employee] has a property interest in a disability-retirement benefit, she has not demonstrated in this case that she did not receive due process regarding her claim for that benefit." Id. at ¶ 31. We determined that the following factors established that she had received the requisite due process: (1) after her application for disability benefits was denied, she sought reconsideration of that decision and obtained a personal appearance before the board to present her position, (2) after the hearing, the retirement system medical advisory committee requested and

received another medical evaluation, (3) after the board upheld its original decision to deny benefits, she had the opportunity to obtain the medical evaluations and the opinion of the medical advisory committee members and to argue in her subsequent mandamus action that the board had abused its discretion in relying on one of the medical reports. Id. at ¶ 31, citing *State ex rel. Haylett v. Ohio Bur. of Workers' Comp.* (1999), 87 Ohio St.3d 325, 332-333, 720 N.E.2d 901. See also *Mathews v. Eldridge* (1976), 424 U.S. 319, 334-335, 96 S.Ct. 893, 47 L.Ed.2d 18 (in determining what process is due, factors include the value, if any, of additional procedural safeguards).

{¶ 26} As in *VanCleave*, Cydrus received the requisite due process: (1) after the retirement board initially decided to terminate her disability-retirement benefits, the board notified her of its decision and the availability of appeal, (2) she was given the opportunity to submit to the board additional objective medical evidence in support of her appeal, and she did so by providing Dr. Sylvester's report, (3) after the retirement board denied her appeal and upheld its decision terminating her benefits, she was able to challenge the decision in this mandamus case, and (4) the medical advisors' recommendations and the board's decisions were available to her and indicated reliance on the examination reports by Dr. Steiman and Dr. Clary. Indeed, unlike the claimant in *VanCleave*, Cydrus did not have the opportunity for a personal appearance upon reconsideration, and the board did not request another

medical evaluation for her appeal. But these are insignificant distinctions. Cydrus raised claims both in the court of appeals and in this appeal that the retirement board had abused its discretion by relying on Dr. Steiman's report and ignoring Dr. Sylvester's report. As in *VanCleave*, it is unclear here how Cydrus's mandamus claim has been prejudiced by the lack of a more descriptive retirement board decision.

{¶ 27} Therefore, neither the separation-of-powers doctrine nor due process requires that the retirement board support its decision terminating Cydrus's disability-retirement benefits by specifically identifying the evidence it relied upon and explaining the reasons for its decision. The retirement board does not have a clear legal duty in this regard, and Cydrus is not entitled to the requested extraordinary relief in mandamus to compel the board to provide a more detailed decision.

C. *Evidence Supporting Board's Decision*

{¶ 28} To be entitled to the requested writ of mandamus to compel the retirement board to vacate its decision terminating her disability-retirement benefits, Cydrus must establish that the board abused its discretion. See *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 25. To prove an abuse of discretion, she must show that the retirement board's decision was unreasonable, arbitrary, or unconscionable. Id. In addition, the retirement board does not

abuse its discretion if there is sufficient evidence to support its determination. *State ex rel. Lucas Cty. Bd. of Mental Retardation & Dev. Disabilities v. Pub. Emps. Retirement Bd.*, 123 Ohio St.3d 146, 2009-Ohio-4694, 914 N.E.2d 1038, ¶ 16.

{¶ 29} Cydrus asserts that the retirement board abused its discretion by relying on Dr. Steiman's report in its decision. She dismisses the report as irreconcilable with the ongoing medical reports of her treating physicians and a prior report of a retirement system medical advisor. She describes the report as "complete nonsense" for opining that her headaches were not work-prohibitive because they were subjective.

{¶ 30} These assertions lack merit. Nothing in R.C. 145.362 or Ohio Adm.Code 145-2-23 requires the retirement board to credit the findings of either Cydrus's treating physicians or one of the consultative physicians over the findings of a different independent medical examiner. See, e.g., *Pipoly*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶ 26 (construing an analogous retirement-disability provision). Notably, other doctors who had examined Cydrus in the past and whose reports are also part of the retirement board's records expressed opinions that were similar to those held by Dr. Steiman. And Dr. Steiman's emphasis on the lack of objective medical evidence to support Cydrus's medical claims is not fatal. "[E]ven for medical conditions with symptoms that are often unsupported by objective medical evidence, 'subjective complaints are not conclusive of

disability, and objective medical evidence is still relevant to a determination of the severity of the condition.'" *Morgan*, 121 Ohio St.3d 324, 2009-Ohio-591, 904 N.E.2d 506, ¶ 23, quoting *VanCleave*, 120 Ohio St.3d 261, 2008-Ohio-5377, 898 N.E.2d 33, ¶ 47.

{¶ 31} Therefore, the retirement board did not abuse its discretion by relying on Dr. Steiman's medical report in terminating Cydrus's disability-retirement benefits. It constituted sufficient evidence to support the board's determination.

D. *The Board's Finding*

{¶ 32} Cydrus claims that the retirement board also abused its discretion by failing to consider the new additional medical evidence she submitted in support of her appeal of the board's termination of her disability-retirement benefits. She asserts that the retirement board ignored the report of her treating physician, Dr. Sylvester. Ohio Adm.Code 145-2-23(B)(3) requires that a recipient of disability-retirement benefits whose benefits have been terminated support an appeal of the decision with "additional objective medical evidence," Ohio Adm.Code 145-2-23(B)(3)(b), which is defined as "current medical evidence documented by a licensed physician specially trained in the field of medicine covering the illness or injury for which the disability is claimed [that] has not been considered previously by the retirement board." Ohio Adm.Code 145-2-23(B)(3)(d).

{¶ 33} The board, however, specified that the decision was "[b]ased upon all the medical information and recommendations." It was free to discount Dr. Sylvester's report because the imaging results she cited were not provided to the board until after the deadline for submission under Ohio Adm.Code 145-2-23(B)(3) had expired. As Dr. Sylvester noted, the neurosurgeon who issued the new imaging report concluded that Cydrus's medical condition was stable.

{¶ 34} Under these circumstances, the retirement board did not abuse its discretion by determining that Cydrus had not submitted sufficient objective evidence of permanent disability entitling her to the continuation of her disability-retirement benefits. She did not submit sufficient evidence to overcome the presumption that the retirement board acted properly by considering and rejecting Dr. Sylvester's recommendation. See *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 29, quoting *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590, 50 O.O. 465, 113 N.E.2d 14 ("'in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner'").

Conclusion

{¶ 35} Based on the foregoing, the retirement board and retirement system did not act in an arbitrary, unconscionable, or unreasonable manner in terminating Cydrus's disability-retirement benefits. Therefore, we affirm the judgment of the court of appeals denying the requested extraordinary relief in mandamus.

Judgment affirmed.

BROWN, C.J., and LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

PFEIFER, J., concurs in judgment only.

Charles Zamora Co., L.P.A., and Charles Zamora, for appellant.

Richard Cordray, Attorney General, and Dennis P. Smith Jr. and Hilary R. Damaser, Assistant Attorneys General, for appellees.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Patricia D. Cydrus,	:	
Relator,	:	
v.	:	No. 09AP-595
Ohio Public Employees Retirement System and Ohio Public Employees Retirement System Board of Trustees,	:	(REGULAR CALENDAR)
Respondents.	:	

DECISION

Rendered on March 23, 2010

Charles Zamora Co., LPA, and *Charles Zamora*, for relator.

Richard Cordray, Attorney General, *Keith A. McCarthy* and *Hilary R. Damaser*, for respondents.

IN MANDAMUS ON OBJECTIONS
TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Patricia D. Cydrus, commenced this original action requesting a writ of mandamus

that orders respondent Ohio Public Employees Retirement Board of Trustees ("board") to vacate its decision terminating her disability benefits and to find she remains unable to perform her job duties and is entitled to continuing disability benefits.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In her decision, the magistrate concluded (1) the report of Dr. Gerald Steiman constitutes new objective evidence on which the board could rely; (2) because the board is not required to identify the evidence on which it relies and is not required to provide a brief explanation when it denies benefits, the board's failure to reference relator's evidence does not indicate the board ignored it; and (3) the board was not required to consider additional medical evidence relator supplied outside the deadline the rules and code established. Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Relator filed objections to the magistrate's conclusions of law:

> A. The Magistrate Erred By Concluding Dr. Steiman's Report Constitutes New, Objective

Medical Evidence, Even Though The Report Provided No New Information Upon Which PERS Could Rely.

B. Relator's Right To Be Given An Explanation As To Why PERS Terminated Her Benefits Is Required By The United States Constitution and the Constitution Of The State Of Ohio.

C. The Magistrate Erred In Stating That PERS Is Not Required To Provide An Explanation As To Why It Terminated The Relator's Disability Benefits.

D. The Magistrate Erred By Failing To Consider The Additional Medical Evidence That Cydrus Provided to PERS.

III. First Objection

{¶4} Relator first contends the report of Dr. Steiman is not new, objective medical evidence on which the board could rely to deny relator's continuing disability benefits. Relator asserts Dr. Steiman's report provided the board with no new medical information or any explanation of what changed to warrant terminating the disability benefits relator had been receiving for years.

{¶5} R.C. 145.362 generally requires a person receiving disability benefits to undergo an annual medical examination, and it further requires the physician or physicians to report and certify to the board "whether the disability benefit recipient is no

longer physically and mentally incapable of resuming the service from which the recipient was found disabled." If the physician reports that the recipient no longer is incapable, and the board finds the evidence persuasive, then "the payment of the disability benefits shall be terminated * * * " R.C. 145.362.

{¶6} Here, as the magistrate noted, Dr. Steiman conducted a physical examination and reviewed the medical evidence in the record. Based on both, he concluded relator no longer is disabled. The board agreed with his report and accordingly terminated relator's benefits. Relator's first objection is overruled.

IV. Second and Third Objections

{¶7} Relator's second and third objections contend (1) the magistrate erred in concluding PERS is not required to explain its decision to terminate relator's benefits, and (2) the board violated relator's due process rights in failing to explain why it terminated her benefits.

{¶8} In *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, the Supreme Court of Ohio refused to impose, in the absence of a statutory duty, any requirement that the decision to deny benefits be explained. While this court in *State ex rel. Green v. Pub. Emp. Retirement Sys.* (June 22 1999), 10th Dist. No. 98AP-567, decided, based on an administrative provision, that the board should at least state the basis for its decision, the

administrative rule since has been changed to eliminate the provision on which *Green* was based. *Hamby v. Ohio Pub. Emp. Retirement Sys.*, 10th Dist. No. 08AP-298, 2008-Ohio-5068. Since no statutory provision requires the board to explain its decision, the magistrate properly concluded that the board was not required to do so. See also *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio St.3d 261, 2008-Ohio-5377. In light of *Pipoly* and *VanCleave*, the holding in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, applied to workers' compensation orders and relied on by relator, does not support relator's request for mandamus relief to require the board to explain its decision.

{¶9} The *VanCleave* court also addressed, in the context of the School Employees Retirement System, relator's due process argument and concluded the statutory process provided adequate due process even though it lacked any requirement that the board explain its decision. Id. (stating the court rejected the "claim that due process required that SERS supports denial of her application for disability-retirement benefits by specifically identifying the evidence it relied upon and explaining the reasons for its decision"). Similarly, relator here received adequate due process even though the board did not cite the evidence it relied on or explain its decision.

{¶10} Relator's second and third objections are overruled.

V. Fourth Objection

{¶11} In her last objection, relator contends the magistrate erred in failing to consider the additional medical evidence relator provided to the board. In particular, relator points to a physician's report and new MRIs "showing that her condition was actually *worsening*." (Emphasis sic.)

{¶12} According to the chronology of record, relator was informed by letter dated November 28, 2008 that the board concluded she no longer was considered permanently disabled. The letter advised her of her appeal rights, including the need to (1) file a written notice of intent to appeal within 30 days of the date of the letter and (2) submit additional objective medical evidence no later than 45 days from the date of the written notice of intent. In a December 3, 2008 letter, relator advised of her intent to appeal; on December 8 she was notified that her intent to appeal was received and that additional evidence was to be filed by January 17, 2009. A November 25, 2008 report of Jennifer E. Sylvester, M.D., was filed on January 12, 2009.

{¶13} A January 20, 2009 letter from Dr. Mast informed relator her appeal was reviewed with the result that she was not considered permanently disabled from performing her duties as an executive secretary. After Drs. Vogelstein and Lowe saw relator, relator's counsel, by letter dated April 14, 2009, requested that the board reconsider the decision to terminate relator's disability benefits. A letter of

April 24, 2009 advised relator's attorney the decision was final.

{¶14} Initially, relator notes Dr. Mast's January 20, 2009 report cited "no new evidence" that would support granting relator's appeal. Relator contends the statement suggests Dr. Mast failed to review her physician's report and MRIs. As the board notes, however, Dr. Mast stated in his report that he "reviewed recent examinations and found there to be no new evidence." In so stating, Dr. Mast simply reflected his conclusion that the additional evidence relator submitted presented nothing different than the medical evidence relator previously submitted, and thus it did not change the board's decision to terminate her benefits. As to the MRIs relator relies on, the magistrate properly concluded that the lack of a timestamp on the MRIs indicates they were not filed with the board. While relator attaches an affidavit to her objections averring that she submitted the October 2008 MRI report on January 12, 2009, evidence submitted to this court cannot be considered in determining whether the board abused its discretion. Accordingly, relator's fourth objection is overruled.

{¶15} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In

accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

KLATT and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Patricia D. Cydrus, Relator,	:	
v.	:	No. 09AP-595
Ohio Public Employees Retirement System and Ohio Public Employees Retirement System Board of Trustees, Respondents.	:	(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on November 25, 2009

Charles Zamora Co., LPA, and *Charles Zamora,* for relator.

Richard Cordray, Attorney General, *Keith A. McCarthy* and *Hilary R. Damaser,* for respondents.

IN MANDAMUS

{¶16} Relator, Patricia D. Cydrus, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Public Employees Retirement Board ("the board") to vacate its

decision which terminated her disability retirement benefits and ordering the board to find that she remains unable to perform her job duties and is entitled to continuing disability benefits.

Findings of Fact:

{¶17} 1. Relator was employed by the Ohio Department of Youth Services as an executive secretary.

{¶18} 2. In 1996, relator was involved in an automobile accident. Following the accident, relator suffered chronic headaches for several years.

{¶19} 3. In December 2000, relator underwent an MRI which revealed an "A Chiari I malformation."

{¶20} 4. In his July 22, 2002 report, relator's treating physician, Lawrence P. Frick, M.D., defined "A Chiari I malformation" as a "congenital malformation of the base of the skull which allows a portion of the brain to herniate through the skull base which then applies pressure on that part of the brain as well as obstructs the normal flow of cerebrospinal fluid."

{¶21} 5. Relator had surgery; however, she continued to have severe headaches.

{¶22} 6. Relator left her position as an executive secretary and, in November 2002, relator submitted an application for disability benefits under the Public Employees Retirement System of Ohio ("PERS") alleging that she was incapacitated from the performance of her duties because of severe muscle spasms,

headaches, and Chiari malformation symptoms which are continuous, require medications, and result in poor balance and sensitivity to light.

{¶23} 7. Relator's application was supported by the November 14, 2002 report of Dr. Frick, wherein he stated, in pertinent part:

> As of today's date, 11-14-02, I think her condition is permanently disabling in that she has not responded to all therapy so far and it has been almost one year since her surgery.
>
> * * *
>
> Her prognosis for full recovery is quite guarded given the duration of her pain. We do continue to try to find modalities that will improve her situation, but prognosis for her to return to work is poor to guarded.
>
> * * *
>
> I don't foresee the patient returning to duty of any type for some time, if ever.
>
> In my opinion, Patricia Cydrus is incapacitated permanently and should receive disability benefit[s] for her disability.

{¶24} 8. Relator was seen by Leslie A. Friedman, M.D., on January 2, 2003. Dr. Friedman provided a history of relator's medical treatment, identified the medical records reviewed, and provided physical findings upon examination. In the discussion portion of the report, Dr. Friedman noted:

> In summary, Patricia Cydrus indicates involvement in an auto accident where she developed headaches. She was subsequently diagnosed with Chiari malformation and underwent a suboccipital decompression. Headaches which were nearly intractable before the operation became intractable after the operation from a historical standpoint. At this point in time, the objective examination is normal.

{¶25} Thereafter, Dr. Friedman offered the following opinion:

> I have reviewed Patricia Cydrus' examination, history, submitted medical records and current complaints. My opinions are based upon a reasonable degree of medical probability. Sufficient time was utilized to arrive at the following conclusions.
>
> In my opinion, Ms. Cydrus is not presumed to be physically incapacitated permanently from the performance of duty and should not be entitled to a disability benefit. While I realize Ms. Cydrus is having frequent severe headaches, I would be optimistic that the distractions of the work place [sic], as well as the known psychosocial benefit of an occupation would prove to be quite beneficial.

{¶26} 9. In a letter dated February 19, 2003, relator was informed that the PERS medical consultant and the board agreed that she was not permanently disabled from performing her job duties as an executive secretary. Relator was also informed that

she had the right to appeal within 30 days and that she could submit additional objective medical evidence no later than 45 days from her written notice of her intent to appeal.

{¶27} 10. In a letter dated March 14, 2003, relator informed the board of her intent to appeal the denial of her disability retirement. Relator's appeal was supported by the March 26, 2003 report of Dr. Frick, wherein he stated:

> The main point of contention regarding her ability to work seems to be the severity of her headaches and whether these are truly incapacitating. As you can see from the records from my office that you already have, she has been to our office several times with these headaches. When she has the headaches[,] they are quite severe and incapacitating. She can sometimes barely walk down the hall and to the examination without the assistance of her husband. She can certainly not fulfill her role as an executive secretary while having one of these severe headaches. The most severe headache[s] seemed to happen about on[c]e or twice a week and she would be unable to perform her duties very frequently. Even during times when she does not have the most severe headaches she does have quite a bit of pain and unfortunately has still required use of narcotics and Diazepam on a regular basis which also make her somewhat groggy and can potentially cloud her judgment. For this reason, she has not driven her car since her surgery. She tells me

> that occasionally that as part of her job she has to drive documents and other items from one building to another and therefore would be unable to perform that part of her job. She would of course also be unable to get back and forth from her home to her work place [sic] as well. Dr. Freedman's [sic] assessment is that the work place [sic] would be a distraction and might actually improve her headaches. I agree with him that some patients do tend to improve once they get back into a normal routine. My concern with Patricia's case is that the severity of her headaches are such that I just don't think that is possible.
>
> I find her to be a very motivated patient. She is still trying to pursue all means possible to improve her headaches and I think that she is well motivated to be able to return to work. I just don't think it is possible with the severity of the headaches at this time.

{¶28} 11. The board requested that relator undergo another examination by Kathy Chang, M.D. In her May 8, 2003 report, Dr. Chang concluded:

> Based on my examination of Ms. Cydrus, she certainly does not have any physical limitations. However, given her history of difficulties dealing with her headache and her being on extensive list of narcotics and pain medication and muscle relaxants, I feel that she needs more pain management to help with her headaches. I believe that these headaches are quite debilitating in the emotional

> and psychological point of view. It certainly prevents her from performing her job, even though she has no "physical limitations" in her physical examination. So, until they find a modality that better treats her headaches, I feel that she would be better served not working in her job at this present time.

{¶29} 12. Thereafter, in a letter dated June 18, 2003, relator was informed that, after reviewing the supplemental medical information, the board approved her disability retirement application with the condition of a re-examination in one year.

{¶30} 13. The office notes from Dr. Frick from July 2003 through July 2004 indicate that relator continued to have severe headaches. Dr. Frick prescribed Topamax and, when she presented with severe headaches, he gave her an injection of Demerol. Apparently, relator had another MRI which showed that the mass in relator's trapezius had not grown in over 18 months. Biopsies of the mass were inconclusive. Relator also continued having left shoulder pain and began using Percocet. On occasion, relator used Valium, but only for the most severe of her headaches. Relator was also given Diclofenac for her headaches without much success. Dr. Frick noted that, apparently, Geoffrey A. Eubank, M.D., had started relator on Amitriptyline; however, she did not improve.

{¶31} 14. In a September 20, 2004 report to Dr. Frick, Laura Popelar, R.N., C.N.P., noted that relator had discontinued the Amitriptyline and had

begun treating with Depakote. At this time, relator was offered different alternatives, including "Depacon infusions" for acute flare-ups, trigger point injections, occipital nerve blocks, and Botox injections. It was noted that her neurological examination failed to reveal any abnormalities, but that she continued to have decreased range of motion of the cervical spine and her trapezius muscles were tender to palpation bilaterally.

{¶32} 15. Relator was referred for an examination by Mazen K. Eldadah, M.D. In his September 23, 2004 report, Dr. Eldadah recommended that relator should be seen by both a psychiatrist and a pain management specialist in order to consider the effect of the excessive use of narcotics and analgesics for her headaches. Dr. Eldadah noted that relator's neurological exam was within normal limits and he opined that relator was not incapacitated and not entitled to a disability benefit.

{¶33} 16. Relator submitted a letter dated September 30, 2004, giving her opinion of why Dr. Eldadah's report was not credible. Relator stated that Dr. Eldadah's exam was cursory, short, that he did not know what medications she was taking, and argued that he improperly challenged her physician's use of narcotics and analgesics to treat her condition.

{¶34} 17. In a letter dated October 20, 2004, relator was informed that the board had approved the continuation of her disability allowance with the condition of a reexamination in one year.

{¶35} 18. Relator continued to see Dr. Frick, and his office notes from November 11, 2004 through August 23, 2005 indicate that relator continued to present with neck pains and frequent headaches which were often severe. Dr. Frick routinely gave her injections of Demerol. Relator reported that she was taking between two and four Percocet per day. In December 2004, relator slipped and fell down her basement stairs and hurt her shoulder. An MRI revealed a rotator cuff tear.

{¶36} 19. In another letter from Lauren Popelar dated January 13, 2005, it was noted that Depakote had helped relator's headaches and they were less severe than they had been. Unfortunately, relator was experiencing some cognitive dysfunction and tiredness while on the medication. It was noted that relator's neurological examination failed to reveal any abnormalities, but that she did have decreased range of motion of her cervical spine.

{¶37} 20. Lauren Popelar saw relator again and, in an April 13, 2005 report to Dr. Frick, she noted that relator had seen Dr. Frick less frequently over the past year, and that she continued to struggle with muscle tightness and stiffness in her neck. She discussed the use of a sequential stimulator; however, elected not to utilize that option. Relator's neurological examination again failed to reveal any abnormalities. Relator remained on the same pain regimen, began using an electrical stimulator, and considered herbal supplements and Botox injections.

{¶38} 21. Relator was seen again by Dr. Eubank and, in his August 4, 2005 report, he opined that her frequent use of pain medication was likely contributing to rebound headaches and that relator should cut back on her usage if she wanted good relief.

{¶39} 22. In November 2005, relator was referred to the Medical Resource Group, Inc., for an examination.

{¶40} 23. Relator was again seen by Dr. Eldadah who authored a report dated December 7, 2005. Dr. Eldadah concluded:

> As mentioned above, this patient has chronic daily headaches. She is status post suboccipital decompression for chairi malformation. I think this patient needs to continue her medication for the chronic daily headaches and she needs to work with her neurologist to control these headaches. Also, I think part of her headaches could be attributed to the use of the narcotics and the pain medication. The patient is not disabled at this point in time.

{¶41} 24. On January 14, 2006, relator authored another letter complaining about Dr. Eldadah and again indicated that his examination was cursory and that he failed to consider any of the information she told him.

{¶42} 25. Relator was referred for another independent medical examination which was performed

by Marc W. Whitsett, M.D. In his February 22, 2006 report, Dr. Whitsett noted relator's history, current complaints, and his physical findings upon examination. He noted that, as a result of her severe, constant and unremitting headaches, she had developed depression and needed to be evaluated by a psychiatrist. He concluded that, as a result of her headaches, she was permanently and totally disabled from her occupational activities as an executive secretary.

{¶43} 26. In a letter dated April 19, 2006, relator was informed that the board approved the continuation of her disability allowance with the condition of a reexamination in one year.

{¶44} 27. Relator continued to see Dr. Frick, and his notes from May 3, 2006 through March 23, 2007 are in the record. Relator continued to have headache pain, as well as chronic hypertension and hyperlipidemia. Relator continued to take Percocet, Depakote, Amitriptyline, and Topamax. There is no indication that relator needed any Demerol injections during this time period. Relator also complained of right ear and chest pain. The most recent MRI showed that the mass in relator's trapezius had grown just slightly. Dr. Frick essentially noted that her headaches remained unchanged. In December 2006, Dr. Frick specifically discussed the cause of relator's rebound headaches and told her that she needed to reduce the amount of Percocet she was using.

{¶45} 28. Relator was seen again by Dr. Eubank and, in his October 5, 2006 report, he noted that her headaches had not improved, she was sometimes taking six Percocet a day, and he asked her to reduce her Depakote. Dr. Eubank indicated that he was running out of treatment options for her headaches and would try her on a prescription of Lyrica.

{¶46} 29. In April 2007, the board referred relator to Sharda K. Bobba, M.D., a specialist in psychiatry and neurology. Following her examination, Dr. Bobba authored a report in which she concluded:

> Based upon the psychiatric evaluation and her nature of the complaints, I do agree with Mar[c] Whitsett, M.D[.] that patient is disabled to work at her previous job. I am quite concerned about her numerous medications that she is on and I do agree with Dr. Whitsett's recommendations. Patient would benefit if she is also under psychiatric care to evaluate further regarding the dosages of the Depakote and Topomax [sic] (which seems to help with her mood stabilization despite given for headaches) and antidepressant medications.

{¶47} 30. In a letter dated June 20, 2007, relator was informed that the board had approved the continuation of her disability benefits with the condition of a re-examination in one year.

{¶48} 31. Relator continued to see Dr. Frick and his office notes from June 1, 2007 through June 5, 2008 are in the record. During this time, relator

continued to have chronic headaches and began experiencing restless leg syndrome. Relator continued on her medications, including Percocet. During this time period, Dr. Frick did give relator injections of Demerol and in June 2008 he gave her an injection of Depo-Medrol and continued her on the Medrol dose pack.

{¶49} 32. Lauren Popelar saw relator again and in her June 26, 2007 report, she noted that, along with her chronic headaches and neck pain, relator was now having pain in both of her hands that she associates with Dupuytren's nodules. It was also noted that relator had some pain in her abdomen and chest and that she had begun taking Pepcid. Relator's neurological examination failed to reveal any abnormalities with the exception of some slight difficulty with finger to nose maneuvers on the right.

{¶50} 33. Relator was seen again by Dr. Eubank and in his December 19, 2007 report he noted that relator was still having severe headaches. He indicated that a trial of steroids did not help, so relator began taking Keppra which also did not help. Dr. Eubank suggested another trial of Lyrica and Botox injections.

{¶51} 34. An MRI of relator's brain was performed on June 11, 2008 at Adena Health System in Chillicothe, Ohio. That study provided:

FINDINGS:

Please note that this study is limited by motion degradation.

The cerebellar tonsils project approximately 9.7 mm inferior to the foramen magnum. This contributes to "crowding" of the foramen magnum.

* * *

IMPRESSION:

[One] There is inferior cerebellar tonsillar ectopia which is also known at the Chiari I malformation. This apparently is a known entity to the patient.

[Two] No acute ischemic change is identified.

{¶52} It was also noted that there were no comparisons available. Unfortunately, this document does not bear a file stamp from PERS and apparently was not available for review.

{¶53} 35. In June 2008, the board referred relator to psychiatrist Richard H. Clary, M.D. In his July 30, 2008 report, Dr. Clary noted that relator reported problems with depression for the past six years; however, she had never been hospitalized for psychiatric problems and had been taking Zoloft for approximately six years. Dr. Clary conducted a mental status examination and ultimately concluded that she was receiving appropriate treatment for her chronic pain and medical problems as well as for her depression and, in his opinion, her depression alone

was not work prohibitive and did not cause long term disability.

{¶54} 36. In August 2008, the board referred relator to neurologist Gerald S. Steiman, M.D. Dr. Steiman examined relator and wrote a report dated September 7, 2008. Dr. Steiman noted relator's history as well as the medical records he reviewed. Thereafter, Dr. Steiman noted that while relator had tenderness through the paraspinal, lateral neck and trapezius muscles, there was no evidence of muscle guarding. Further, he noted that there was no evidence of a painful, tender, or trigger point in the occipital, low cervical trapezius or supraspinatus regions. Spurling's signs were negative bilaterally and relator had 30 to 35 degrees of forward flexion, 25 to 30 degrees of extension, 20 to 25 degrees of right and left lateral bending, and 30 to 35 degrees of rotation to either side. Thereafter, Dr. Steiman concluded:

> Ms. Cydrus presents with a history of recurrent and ongoing headaches beginning in the mid 1990's. In 2000[,] an MRI of the brain revealed an Arnold Chiari malformation and Ms. Cydrus underwent surgery in 2002. Thereafter, she has continued to have headaches that are described as constant and severe. As a result of her headaches she is unable to participate in activities. Ms. Cydrus is currently on numerous medications for her headaches. She recalls being told by Dr. Benzel, her neurosurgeon, that should she ever fall down the stairs or be

> involved in an accident she will absolutely need to have neck surgery with insertion of a cadaver shelf to the base of her brain.
>
> * * * Ms. Cydrus' history, medical record review and physical exam provides credible evidence that she is not permanently disabled for the performance of her position as a public employee.
>
> Ms. Cydrus does have a history of an Arnold Chiari Malformation S/P surgery. Her only manifestations are subjective headaches. Although her headaches are painful, the subjective nature of her headaches would indicate they are not work prohibitive and do not create an impairment which would preclude her ability to return to her prior job activity.

{¶55} 37. An MRI was taken at Riverside Methodist Hospital on October 6, 2008 and revealed the following:

> The cerebellar tonsils extend through the foramen magnum approximately 14 mm. Mild compression of the cerebellar tonsils. The cervicomedullary junction is normal in appearance.
>
> The ventricles, suici and basilar cisterns are otherwise normal in appearance. No intraaxial mass or enhancement abnormality. No evidence restricted diffusion. Good flow void is seen within major vessels. The orbital apices and the infratemporal fossa are normal.

> The patient is status post resection of the posterior ring C1[.]
>
> * * *
>
> [One] Chiari malformation. The cerebellar tonsils extend 14 mm below the foramen magnum.
>
> [Two] No evidence of hydrocephalus.

According to the report, no comparison was made with previous MRIs. Further, this MRI report does not bear a file stamp from PERS and was not available for review. Further, there is no explanation why MRIs were taken June 11, 2008 and again October 6, 2008 and, it is also noted that the studies were performed differently. The June MRI was diffusion weighted imaging and the October MRI was diffusion imaging with and without contrast.

{¶56} 38. By letter dated November 13, 2008, relator was informed that, based upon all the medical information and recommendations, the board had concluded that she was no longer considered to be permanently disabled from the performance of her duties as an executive secretary. Specifically, she was notified that there was insufficient objective medical evidence of permanent disability due to chronic daily headaches, and her disability benefits would be terminated. Relator was also informed of her appeal rights, specifically:

* * * In order to file an appeal you must:

[One] File a written notice of your intent to appeal the board's termination. Your notice stating you wish to appeal and will supply additional objective medical evidence must be received no later than 30 days from the date of this letter.

[Two] Submit the additional objective medical evidence no later than 45 days from your written notice of intent. A licensed physician trained in the field of medicine covering the illness or injury for which the disability is claimed must submit this medical evidence. The physician(s) should submit a ***current, complete and comprehensive report*** on his/her own letterhead to us for review. * * * After you have submitted your additional medical evidence, it will be reviewed and you will be notified of the board's action on your appeal, which may include the request for you to undergo an additional independent medical examination[.] * * * You may also submit a written request for an extension to allow additional time to present your additional objective medical evidence (physician reports). However, this request must be made within the first 45-day period after you file your notice of intent to appeal. You may be granted only one additional 45-day period to submit your medical evidence.

If you do not file your notice or medical evidence within the time allowed, the board's

> action will be final and any future application for a disability benefit must be submitted with supporting medical evidence of progression of the disabling condition or evidence of new disabling condition(s). An application must be submitted within two years of terminating public service. Any application received after the two years has expired, cannot be accepted.

(Emphasis sic.)

{¶57} 39. A November 25, 2008 report was submitted by Jennifer E. Sylvester, M.D., who had been treating relator for most of 2008 since Dr. Frick left the practice. Dr. Sylvester reiterated that relator continued to suffer from severe headaches which have caused narcotic dependency in order to sustain normal functioning during even part of a day. She indicated that there are many days when relator is nonfunctional, must sleep in a darkened room in order to maintain some control of her pain, and cannot drive. Dr. Sylvester referenced documentation, presumably the June 11 and October 6, 2008 MRIs, indicating that the protrusion had progressed. Dr. Sylvester outlined the treatment attempts, as well as their failures. She noted that, in her professional opinion, relator had been permanently disabled since 2002 and she not only has chronic pain that requires narcotic treatment, but she is unable to drive on most days and has difficulty even ambulating without an unsteady gait.

{¶58} 40. In a letter dated December 3, 2008, relator gave notice of her intent to appeal the termination of her disability benefits as well as any reliance on the report of Dr. Steiman.

{¶59} 41. On December 8, 2008, relator was notified that her intent to appeal had been received and advised her:

> * * * You will need to submit a current and complete medical report from your attending physician supporting your disability by January 17, 2009.
>
> Once your additional medical evidence has been received, our medical advisor will review it. You will be notified of the action on your appeal, which may include the request for you to undergo an additional independent medical evaluation[.]

* * *

{¶60} 42. Relator submitted a January 11, 2009 letter appealing the report of Dr. Steiman. According to relator, his review was cursory, he berated the physicians and treatments which relator had been receiving for years, failed to listen to anything she said, and requested his report be overturned and that she never be required to see him again.

{¶61} 43. In a letter dated January 20, 2009, relator was informed that her appeal had been considered and that, based upon all the medical information and recommendations, she was not considered

permanently disabled from the performance of her duty as an executive secretary, and that there was insufficient objective evidence of permanent disability due to "[n]o additional new information." Relator was informed that the board was upholding its previous decision to discontinue her benefits and that the decision regarding her appeal was final.

{¶62} 44. Relator was examined by Seth H. Vogelstein, D.O., on February 17, 2009. Dr. Vogelstein noted relator's history as well as the medical records he reviewed, provided his physical findings upon examination, and concluded that she was unable to perform her former duties as an executive secretary.

{¶63} 45. Beal D. Lowe, Ph.D., prepared a vocational psychological evaluation after seeing relator on February 24, 2009. In his March 7, 2009 report, Dr. Lowe concluded that relator suffered from major depressive disorder as well as pain disorder associated with both psychological factors and a general medical condition. He opined that relator continued to be totally disabled and unable to perform her usual duties as an executive secretary. He also noted that Dr. Clary had diagnosed dysthymia and that he noted a current GAF (Global Assessment of Functioning) score of 70. According to Dr. Lowe, that finding was consistent with the results of Dr. Lowe's administration of the Beck Depression Inventory which asked relator to describe her symptoms prior to the onset of her recent distress. Dr. Lowe concluded:

> In light of her continuing headaches and the diagnosed pain disorder and depression, this examination finds Ms. Cydrus to lack any capacity to adapt to the workplace stress which she would experience if she were to attempt to return to perform her usual, demanding occupation. An attempt to return to such work would only increase her headaches and related limitations. This assessment finds her to be permanently and totally disabled from any return to her usual employment.

{¶64} 46. In a letter dated April 14, 2009, relator, through her attorney, requested that the board reconsider the termination of her disability retirement based on the new reports of Drs. Vogelstein and Lowe.

{¶65} 47. In a letter dated April 24, 2009, relator's attorney was informed that the January 20, 2009 board decision finding that she was no longer permanently disabled from her last public position was final:

> Patricia Cydrus was terminated from disability at the November 13, 2008 Board meeting (copy of that letter is enclosed). Ms[.] Cydrus appealed the Board's decision and an acknowledgement letter was sent to her on December 8, 2008 (copy of that letter is enclosed). Once all medical information was received in our office[,] Ms[.] Cydrus' file was reviewed by the Board on January 20, 2009, the Board upheld the previous decision in

> finding Ms[.] Cydrus no longer permanently disabled from her last public position. As stated in that letter[,] the decision regarding the appeal is final (copy of that letter is enclosed).
>
> Any subsequent applications for a disability benefit filed after a denial of an appeal shall be submitted with medical evidence supporting progression of the disabling condition or evidence of a new disabling condition. If two years have elapsed since the date the member's contributing service terminated, no subsequent application shall be accepted. Ms[.] Cydrus['] final date compensated was June 28, 2003.

{¶66} 48. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶67} For the reasons that follow, it is this magistrate's conclusion that relator's request for a writ of mandamus should be denied.

{¶68} Mandamus is the appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219. Because there is no statutory appeal from the board's determination that relator is not entitled to continued disability benefits, mandamus is an appropriate remedy. See, for example, *State ex rel. Davis v. Pub.*

Emps. Retirement Bd., 120 Ohio St.3d 386, 2008-Ohio-6254. An abuse of discretion exists when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760. When there is "some evidence" to support the decision, the retirement system has not abused its discretion. Id.

{¶69} Pursuant to R.C. Chapter 145, disability benefits are payable when it is determined that the member is mentally or physically incapacitated from the performance of duty by a disabling condition either permanent or presumed to be permanent. A disability is presumed to be permanent if it is expected to last for a continuous period of not less than 12 months following the filing of the application. Pursuant to R.C. 145.362, the board shall require any recipient of disability benefits to undergo an annual medical examination to determine whether or not the disability is ongoing. If, based upon medical evidence, the board concludes that the disability benefit recipient is no longer incapable of performing their job duties by a disabling condition, the payment of disability benefits shall be terminated. See R.C. 145.362.

{¶70} An appeal process is specifically provided and outlined in Ohio Adm.Code 145-2-23 as follows:

> (A) This rule applies when the public employees retirement board either denies an application for a disability benefit * * * or terminates a disability benefit[.] * * *

(B)

(1) After the retirement board has either denied an application for, or terminated, a disability benefit, the member shall be notified in writing of such action.

* * *

(3) The notice shall include the following information:

(a) The retirement board's denial or termination of the disability benefit.

(b) The member's right to file a written notice of intent to provide additional objective medical evidence. Such notice of intent must be received by the retirement board no later than thirty days from the date of the notice of denial or termination.

(c) Failure of a member to submit a notice of intent to provide additional medical evidence shall make the retirement board's action final as to such application or benefit.

(d) Such additional evidence shall be current medical evidence documented by a licensed physician specially trained in the field of medicine covering the illness or injury for which the disability is claimed and such evidence has not been considered previously by the retirement board. Such additional medical evidence shall be presented in writing by the member and shall constitute an appeal of the denial or termination.

> (e) Failure to provide the additional medical evidence within forty-five days of the member's notice of intent to provide such evidence shall make the retirement board's action final to such application or benefit unless an extension for submission of such evidence has been requested and granted within the forty-five days. * * *
>
> * * *
>
> (C)
>
> (1) After submission of any additional medical evidence * * *, all evidence shall be reviewed by the retirement board's medical consultant(s) who shall recommend action for concurrence by the board.
>
> * * *
>
> (3) If the board concurs with a recommendation for denial of the appeal, the member shall be notified by regular mail of the board's decision and such decision shall be final.

{¶71} In the present case, following relator's initial application for disability benefits in 2002, the board denied the request. Relator followed the appeal process and submitted additional objective medical evidence. Thereafter, the board, in essence, reversed its denial and granted relator disability retirement benefits conditioned on her submitting to a yearly reexamination.

{¶72} The board sent relator for annual examinations and continued to find that she was entitled to continue receiving disability retirement benefits for the next several years.

{¶73} In 2008, relator was notified that she would be re-examined by Drs. Clary and Steiman. Dr. Clary opined that relator's depression alone was not work prohibitive and did not cause long term disability. Following his review of the medical records and his physical examination, Dr. Steiman concluded that there was no credible evidence that relator was permanently disabled from the performance of her position as an executive secretary. He concluded that the subjective nature of her headaches indicated that they were not work prohibitive and do not create an impairment precluding her from returning to her prior job activities.

{¶74} As with the board's original denial, relator began the appeals process. Relator submitted a letter criticizing Dr. Steiman and his examination and urging the board to remove his report from evidentiary consideration. Relator also submitted a report from her treating physician, Dr. Sylvester, reiterating the statements already contained in other reports and office notes. Although Dr. Sylvester noted that imaging studies revealed that relator's protrusion had increased, neither MRI was filed with PERS. Apparently, the board did not consider this report (more than 9/10 of which contained no additional or new evidence) sufficient documentation to reverse its denial. The board upheld its original determination to

terminate her disability retirement benefits and notified her of that decision.

{¶75} Several months later, and outside the applicable deadline for submitting additional objective medical evidence, relator filed a request for reconsideration and attached additional medical reports from Drs. Vogelstein and Lowe. The board denied relator's request for reconsideration and relator brought this mandamus action in this court.

{¶76} In the present case, the board followed the Ohio Revised Code and Ohio Administrative Code provisions. The board sent relator for yearly medical examinations and, based upon those reports, the board notified relator that her disability retirement benefits would be terminated. Relator did appeal; however, as stated in the findings of fact, aside from Dr. Sylvester's report, relator failed to produce any additional new objective medical evidence, neither MRI nor new doctors' reports, for the board's consideration. Thereafter, the board denied her appeal and affirmed its earlier decision to terminate her retirement benefits. The above actions comply with the requirements of the law.

{¶77} Relator argues that Dr. Steiman's report is invalid and cannot constitute some evidence upon which the board could rely. Relator argues further that the board ignored evidence of her ongoing disability and progression and, lastly, the board should have considered the additional evidence she submitted in April. This magistrate disagrees.

{¶78} Relator first argues that Dr. Steiman's report does not constitute new objective evidence. This magistrate disagrees. While relator contends that Dr. Steiman's examination was cursory and that he was rude, a review of his report indicates that he conducted a physical examination and reviewed the medical evidence in the record. Based upon his examination and review of the medical evidence, Dr. Steiman concluded that relator was no longer disabled. Further, the fact that he noted her headaches were subjective is not a reason to remove his report from evidentiary consideration. Relator also argues that Dr. Steiman's report does not constitute additional objective medical evidence presumably because he did not document any specific findings. The magistrate disagrees. Dr. Steiman did make objective findings, reviewed the medical evidence and opined that she was not disabled. Contrary to relator's assertions, Dr. Steiman's report does constitute some evidence upon which the board could rely.

{¶79} Relator also contends that the board ignored her timely submitted additional evidence. Relator contends that Dr. Frick's office notes demonstrate that over the years her condition had not improved. Relator is correct that Dr. Frick's office notes constitute some evidence upon which the board could rely; however, relator is incorrect to argue that the board was required to give Dr. Frick's office notes greater weight than the other evidence in the record. Relator also contends that Dr. Sylvester's November 25, 2008 letter constitutes sufficient objective medical

evidence that her condition had progressed. As such, relator argues that the board should have relied on it and continued her on disability.

{¶80} In her report, Dr. Sylvester apparently referenced the June and October MRIs which were not filed with PERS. Whether or not this one-sentence reference constitutes new objective medical evidence need not be answered here. The board doctors are the ones charged with reviewing the evidence and assessing the weight and credibility given to that evidence. The board is not required to identify the evidence upon which it relies and is not required to provide a brief explanation when it denies disability retirement benefits because the statutes and rules which apply do not require that the board state the basis of its denial of disability retirement.

{¶81} Further, relator is incorrect to argue that the board was required to consider the additional medical evidence she supplied outside the deadline established by the rules and code. Relator failed to timely file additional objective medical evidence with her appeal after the board notified her of its decision to terminate her disability retirement benefits. Because she missed the deadline, the board made its decision without her additional evidence and the fact that the board did so does not constitute an abuse of discretion.

{¶82} Over the years, evidence was presented both supporting and contrary to ongoing disability. The board was cognizant of this evidence and

ultimately concluded that relator was not entitled to ongoing disability compensation.

{¶83} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the board abused its discretion in deciding to terminate her disability retirement benefits and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

[LOGO] **Ohio Public Employees Retirement System**
OPERS 277 East Town Street • Columbus, Ohio
43215-4642 • 1-800-222-7377 • www.opers.org

January 20, 2009

Patricia D. Cydrus 9672
15 Windsor Dr
PO Box 338
Kingston OH 45644

Dear Ms. Cydrus:

The Ohio PERS Board of Trustees reviewed your disability file and recent reports of medical reexamination at the January 20, 2009 meeting.

Based upon all the Medical information and recommendations, the Ohio PERS medical advisors and the board concluded that you are not considered to be permanently disabled from the performance of duty as a Executive Secretary. Specifically, there is insufficient objective evidence of permanent disability due to No additional new information. On the basis of this information, the board upheld its previous action to discontinue your disability benefits. **This decision regarding your appeal is final.**

Any new disability benefit application must be received within two years of the date your contributing service terminated. This new application must include medical evidence, which shows progression of the disabling condition or a new disabling condition. If it has been more than two years since your contributing service terminated then you are no

longer eligible to submit a new disability benefit application.

If you have any questions, please feel free to contact us at 1-800-222-7377.

Sincerely,

Ohio PERS

[LOGO] **Ohio Public Employees Retirement System**
OPERS 277 East Town Street • Columbus, Ohio
43215-4642 • 1-800-222-7377 • www.opers.org

November 13, 2008

Patricia D. Cydrus 9672
15 Windsor Dr
PO Box 338
Kingston OH 45644

Dear Ms. Cydrus:

The Ohio PERS Board of Trustees reviewed your disability file and recent reports of medical reexamination at the November 13, 2008 meeting.

Based upon all the medical information and recommendations, the Ohio PERS medical advisor and the board concluded that you are no longer considered to be permanently disabled from the performance of duty as Executive Secretary. Specifically, there is insufficient objective evidence of permanent disability due to chronic daily headache. Therefore, your disability benefit will be terminated. We will discontinue paying you disability benefits and providing you with health care coverage, effective February 28, 2009. Following the termination of your health care coverage, the OPERS health care department will inform you of available options for continuing your health care coverage.

You have a right to appeal the board's termination of your disability benefit. If you wish to appeal this action, you may supply additional objective medical

evidence, at your expense, to us as the basis of your appeal. In order to file an appeal you must:

1. File a written notice of your intent to appeal the board's termination. Your notice stating you wish to appeal and will supply additional objective medical evidence must be received no later than 30 days from the date of this letter.

2. Submit the additional objective medical evidence no later than 45 days from your written notice of intent. A licensed physician trained in the field of medicine covering the illness or injury for which the disability is claimed must submit this medical evidence. The physician(s) should submit a ***current, complete and comprehensive report*** on his/her own letterhead to us for review. The cost of such examinations and reports are your responsibility and cannot be paid by us. After you have submitted your additional medical evidence, it will be reviewed and you will be notified of the board's action on your appeal, which may include the request for you to undergo an additional independent medical examination with a physician selected by OPERS. If your appeal is granted and your disability benefit is ultimately reinstated, benefits will be resumed at the point of the original termination. You may also submit a written request for an extension to allow additional time to present your additional objective medical evidence (physician reports). However, this request must be made within the first 45-day period after you file your notice of intent to appeal. You may be granted only one additional 45-day period to submit your medical evidence.

If you do not file your notice or medical evidence within the time allowed, the board's action will be final and any future application for a disability benefit must be submitted with supporting medical evidence of progression of the disabling condition or evidence of new disabling condition(s). An application must be submitted within two years of terminating public service. Any application received after the two years has expired, cannot be accepted.

If you have any questions, please feel free to contact us at 1-800-222-7377.

Sincerely,

Ohio PERS